Supreme Court, U. S.
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IN THE

Supreme Court of the United States

..... Term, ...

No. 78-1113

EDWARD ROSAS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), and the Fourth and Fourteenth Amendments to the United States Constitution.

Petitioner's Petition for Hearing to the California Supreme Court was denied without opinion on October 18, 1978. Petitioner was originally sentenced on No-

vember 3, 1977, filed a Notice of Appeal on November 17, 1977, and has been in the process of pursuing his state remedies until final denial of a hearing on October 18, 1978.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United State Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

as applied to the states by the Fourteenth Amendment (Section 1) to the United States Constituion:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

1. Can evidence resulting from an "administrative search" of a body shop constitutionally be admitted

when the search is purportedly conducted under the authority of the California Vehicle Code §2805, which provided:

> "A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."[1]

2. If "administrative searches" under California Vehicle Code §2805 are generally constitutional, can said evidence be constitutionally admitted when the search was not a routine inspection, but rather a search for a specific stolen car which an untested informant said was in the shop being dismantled?

---

[1] Effective January 1, 1978 (after appellant's conviction) Section 2805 was amended to read:

> "(a) For the purpose of locating stolen vehicles, a member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment and may inspect the title or registration of vehicles in order to establish the rightful ownership or possession of the vehicle.
>
> (b) A member of the California Highway Patrol may also inspect, for the purposes specified in subdivision (a), implements of husbandry, special construction equipment, and special mobile equipment in the places described in subdivision (a) or when such a vehicle is incidentally operated or transported upon a highway.
>
> (c) Whenever possible, inspections conducted pursuant to subdivision (a) or (b) shall be conducted at a time and in a manner so as to minimize any interference with, or delay of, business operations."

STATEMENT OF THE CASE

An untested informant told San Jose Police Officers that a particular stolen vehicle was in the Mac Perez Body Shop. Upon verifying only that the vehicle had actually been stolen, a number of officers surrounded and entered the body shop. They entered by opening a large wooden sliding door into the repair area. They had no permission to enter and no search warrant.

The State justified this intrusion on the ground that it was an administrative inspection under California Vehicle Code §2805. However, the officers indicated this was not a routine inspection, was not on their agenda for that day, and was in response to the report of a specific crime.

Once inside the body shop, the officers searched the entire shop and seized auto parts, automobiles, tools, documents, and other matters. The original search was conducted before arresting Mr. Rosas and others.

Mr. Rosas moved to suppress all evidence discovered by this search. The Superior Court (County of Santa Clara, State of California) suppressed some evidence on the ground that the search went beyond the scope of §2805. However, the Court did not suppress the basic evidence—the stolen vehicle and some parts thereof. Rosas pled guilty to violation of Penal Code §496 (receiving stolen property). Under the provisions of California Penal Code §1538.5, his right to appeal the determination of his motion to suppress was preserved.

Rosas appealed and California's Court of Appeal, First Appellate District, Division Four, affirmed the lower court on August 24, 1978. Its unpublished

opinion is attached hereto. Rosas' Petition for Hearing to the California Supreme Court was denied without opinion on October 18, 1978.

Petitioner raised these issues in a proper, timely fashion. They were first raised by a motion to exclude evidence at the Preliminary Hearing on March 1, 1977. Following this, a motion to suppress under Penal Code §1538.5 was filed and heard on April 18, 1977. Both motions raised the issues presented herein.

The Honorable Peter Anello's ruling of April 25, 1978 on Petitioner's Motion to Suppress is quoted here in full to satisfy Supreme Court Rule 23(f):

> "California Vehicle Code, Section 2805, is constitutional, (*People v. Grey*, 23 CA 3d 456 (1962)). The description 'any member of the California Highway Patrol' contained therein has been interpreted by the Appellate Courts to include all peace officers. (*People v. Brown*, 4 CA 3d 382, 387 (1970); *People v. Hunter* (1969) 1 CA 3d 461, 464. Therefore, the entry by San Jose Police Officers on January 6, 1977, of the licensed body shop located at 6 San Jose Avenue was legal and not in violation of any constitutional restraints.
>
> The observation and seizure of the following automobile parts located in the garage and yard area of the premises was proper:
>
> 1. Engine with No. L28061330 stamped into block and accompanying transmission (garage);
> 2. Front end of a brown Datsun 280Z with VIN number GHLS 39934062 (garage);
> 3. Left rear quarter panel of a brown Datsun 280Z with the rear axle and drive shaft attached (garage);
> 4. Seats, spare tire, right rear fender quarter panel, and trunk deck lid (yard);

5. Left door roof, left rear piece with muffler and gas tank (yard);

Certain activities of the officers exceeded the scope of Vehicle Code 2805 and the motion to suppress as to the following items is granted:

6. All items found in the large tool chest, including: Mail addressed to Edward Rosas, barrels to a double barrel shotgun, and marijuana;
7. Mikuku .38 caliber revolver with leather holster, Serial No. 27914;
8. Two acetylene tanks on carrier bracket with gauges and hoses;
9. Tools from cardboard barrel;
10. All documents seized from the locked interior office located within the premises;
11. VIN plate from Datsun 280Z bearing numbers GHLS 30034062 and L28061330 (floor of garage);
12. Two license plates bearing the number 781 PGV and other small parts of the Datsun 280Z (cardboard barrel in garage).

The motion to suppress statements of defendants, witnesses, or other parties related to the aforedescribed automobile parts, Items 1 through 5, inclusive, is denied.

The motion to suppress statements of defendants, witnesses, or other parties related to the items seized from the tool chest, the revolver, tools, the documents, seized from the interior office, the VIN plate and the license plates, Items 6 through 12, inclusive, is granted.

DATED: April 25, 1977.

/s/ Peter Anello

JUDGE OF THE SUPERIOR COURT"

Clerk's Transcript for an Appeal from the Judgment of the Superior Court of California, in and for the County of Santa Clara, Pages 173 through 175.

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case to resolve an anomaly in the developing area of administrative search law, and to bring the California case law into accord with the Court's opinions—particularly the opinions in *Marshall v. Barlows, Inc.*, 436 US 307 (1978); *Colonnade Catering Corp. v. United States*, 397 US 72 (1970); and *United States v. Biswell*, 406 US 311 (1972).

A. California Vehicle Code §2805 is Unconstitutional.

Petitioner contends that California Vehicle Code §2805 is unconstitutional, and that the "inspection" (search) conducted by the officers under its authority must be deemed illegal and the fruits thereof suppressed. Section 2805 states:

> "A member of the California Highway Patrol may inspect any vehicle of the type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."[3]

[3] Under QUESTIONS PRESENTED FOR REVIEW the amendment to Section 2805 is set forth in full. It did not become effective until January 1, 1978, long after the "administrative search" here challenged.

Petitioner contends that this Section is unconstitutional in that it does not meet the balancing tests set forth by the United States Supreme Court and because it is not properly limited in time, place, and manner.

Since *Camara v. Municipal Court*, 387 US 523 (1967), and *See v. City of Seattle*, 387 US 541 (1967) it has been clear that administrative inspections or searches are subject to the Fourth Amendment. As noted by the California Supreme Court in *People v. Hyde*, 12 Cal. 3d 158. ; 66 (1974):

> "Like all searches subject to the Fourth Amendment, an administrative screening must be measured against the constitutional mandate of reasonableness. In the case of administrative searches, however, 'there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.' (*Camara v. Municipal Court* 1967 *supra* 387 US 523, 536-537)"

The *Hyde* case follows controlling U.S. Supreme Court doctrine. In a series of cases, this Court has set down standards for administrative searches. California Vehicle Code §2805 does not meet these standards.

In strictly regulated industries, such as the firearms and liquor industries, the Supreme Court has recently held in *Biswell, supra*, and *Colonnade Catering, supra*, that the warrant required in *Camara* and *See* is not always necessary. However, in these two decisions the United States Supreme Court set forth other applicable factors which safeguard privacy interests. In *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (1976), the Court summarized these factors as follows:

> "First the enterprise sought to be inspected must be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspection will pose only a minimal threat to justifiable expectations of privacy. Second, warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest. Third, the inspection must be conducted with a statutorily authorized procedure, itself carefully limited as to time, place, and scope. The presence of this factor guards against the possibility that any inspection right will be abused."

In Dunlop, the defendant was a business enterprise subject to the Occupational Safety and Health Act of 1970 (29 USC §521 et. seq.) and the Secretary of Labor sought a warrantless inspection. The District Court found its interpretation of the *Colonnade* and *Biswell* cases to be applicable in light of more recent United States Supreme Court cases continuing the Court's adherence to the *Camara/See* doctrine. (See *Almeida/Sanchez v. United States*, 413 US 266 (1973) and *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 US 861, 864 (1974)). The Court concluded that *Colonnade* and *Biswell* created an exception to the general *Camara/See* rule only when these protective factors were present.

Biswell and *Colonnade Catering* represent a limited exception to the *Camara/See* rule in cases where narrowly limited administrative searches are so necessary to public welfare that the need outweighs a limited intrusion. Both involved industries of substantial public danger. Firearms are the basic tools of violence and crime. Liquor is not only a major source of governmental revenue, but is dangerous to health and welfare

if adulterated, improperly prepared, or distributed to improper persons. The substantial governmental interest in preventing these dangers outweighs the limited intrusion to insure compliance with pervasive regulations.

Marshall v. Barlows, Inc., 436 US 307 (1978), characterizes these exceptions to the warrant requirement as responses to "relatively unique circumstances":

> "These are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy [citations] could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulations." 436 US at 313.

The automobile wrecking or repairing industry does not present such unique circumstances and therefore the administrative inspection allowed by California Vehicle Code §2805 does not come within these exceptions. In the present case, the auto repair and wrecking industry certainly is not "pervasively regulated" in the sense that the weapon or liquor industries considered in *Biswell* and *Colonnade* are. Nor is the industry one of great public danger. Furthermore, California Vehicle Code §2805 is not part of a pervasive regulatory scheme, but is rather enacted specifically to aid in apprehending one type of criminal.

This Court has carefully limited the exceptions to the *Camara/See* rule requiring warrants, stating:

> "The element which distinguishes these enterprises from ordinary businesses is a long tradition of government supervision, of which any person who chooses to enter such a business must already be aware. 'A central difference between those cases [Colonnade and Biswell] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessmen in a regulated industry in effect consents to the restrictions placed upon him.' *Almeida Sanchez v. United States*, 413 US 266, 271 (1973)."

Petitioner is clearly involved in an "ordinary business," rather than one with a long history of regulation. To bring the California decisional law into line with that announced in *Marshall* and its predecessors, this Court should grant Certiorari and review this case.

Furthermore, the third requirement derived by *Dunlop* from *Biswell* and *Colonnade*—that the inspection be conducted in accordance with a statutorily authorized procedure carefully limited as to time, place, and scope—clearly has not been met.[8] Where the legislature has authorized inspection but made no rules

[8]Petitioner contended below that the California law of inspection warrants (California Code of Civil Procedure §§1822.50 et. seq.) should be construed as applicable to Vehicle Code §2805 in order to make the statute constitutional. Since there was no inspection warrant issued, this construction would have vitiated the search without invalidating the statute. However, the Court of Appeals rejected this theory, holding the inspection warrant sections inapplicable. Therefore, the discretion to search was, at the time of this incident, unlimited and not subject to even the minimal regulation of submission of an inspection warrant to a magistrate.

governing the procedures that the inspection must follow, the Fourth Amendment and its various restrictive rules including the requirement of search warrants issued on probable cause apply. *Colonnade Catering v. United State, supra*, 397 US 72, 77. The instant search, lacking any warrant, does not satisfy these standards.

The time, place, and manner limitations required by *Biswell, Colonnade Catering*, and the following cases cannot be found in the general reasonableness requirements of the Fourth Amendment. In interpreting *Biswell* and *Colonnade Catering, Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (1976), clearly pointed out that, "The inspection must be conducted within a *statutorily authorized procedure*, itself carefully limited as to time, place, and scope." [Emphasis Added] This requirement at least substitutes the judgment of the Legislature for the judgment of the neutral, detached magistrate normally required by the Fourth Amendment, if searches without warrants are to take place. This is carried one step further, and one step too far, if it is suggested that in place of the Legislature's determination officers engaged in the competitive enterprise of ferretting out crime can utilize such judgment and regulate the time, place, scope, and manner of the search.

Thus it can be seen that this decision conflicts with the controlling decisions of this Court in an important, developing area of decision. Petitioner submits that this Petition should be granted and the matter heard and decided.

B. Using California Vehicle Code §2805 as the Basis for a Warrantless Search in Investigating a Specific Crime is Unconstitutional.

"... [T]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 US 1, 19 (1968). Thus if California Vehicle Code §2805 is justified as allowing "administrative" searches because of its part in general regulation of auto body and wrecking shops, it must be limited to "administrative" uses. To pervert such a provision into a substitute for a warrant in a criminal investigation goes beyond the logic of cases allowing "administrative" searches and intrudes on Fourth Amendment guarantees.

This is not a case involving a routine inspection which happens to discover evidence of crime. On the contrary, the officers had information and used §2805 in place of a warrant in a criminal investigation. *United States v. Anile*, 352 F. Supp. 14 (1973) considered similar circumstances. In that case, the inspection had been prompted by complaints about the defendant's activities, which apparently raised serious questions in the authorities' minds. These were the sole reasons for the initial visit to defendant's business and the inspection of his records. Clearly, this was not a routine inspection, but one done in furtherance of a criminal investigation. The court held that a warrant was required in such instances, stating:

> "The court recognizes that on many occasions it can be successfully argued that suspicion does not convert an administrative investigation into a

traditional criminal investigation. The problem is, of course, one of degree. The prime consideration must be the protection of recognized basic individual rights, and these individual rights should not be affected by mere labels, particularly where the substance of the matter under investigation is not consistent with the label that it attached to is.

It is further noted that search warrants for administrative inspections may be obtained under the present comprehensive Drug Abuse Prevention and Control Act of 1970 without establishing probable cause standard required in criminal cases. [citations] Perfunctory as it may be under present law, the decision of an independent judicial law officer is still a necessary factor. That factor is totally missing in this case. Under the facts here, a search warrant obviously should have been obtained prior to the agents first entry upon defendant's place of business."

(See also *Abel v. United States*, 362 US 217, 226 (1960) in which the Supreme Court condemned use of administrative warrants for purposes of gathering evidence in a criminal case.)

Assuming arguendo that inspections under Vehicle Code §2805 done on a routine basis might be so minimally obtrusive as to meet constitutional standards, nevertheless it is clear that in cases of actual criminal investigation, the statute cannot constitutionally be used to replace the traditional probable cause/warrant standard.

In construing this Court's decisions to allow predeparture screening searches of passengers boarding at airports, the California Supreme Court noted, as one justification for the scheme, the fact that the " . . .

essential purpose . . . is not to ferret out contraband or to preserve for trial evidence of criminal activity." *People v. Hyde, supra*, 12 C. 3d 158, 169-170 (1974). Here, the supposedly "administrative" search authority was used for exactly that purpose. Thus as applied, §2805 was unconstitutional and the evidence should be suppressed.

As more and more businesses come under government regulation, it is important for this Court to draw the line at which administrative search authority ends and the protection of the Fourth Amendment begins. This case involves that point, and therefore it is appropriate that Certiorari be granted to resolve these questions.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests this Court to grant a Writ for Certiorari, bringing this matter up for hearing and determination.

APPENDIX A

OPINION OF THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

(APPENDIX A)

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY
AUG 25 1978

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

FILED
AUG 24 1978
Court of ... Dist.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EDWARD ROSAS, et al.,
Defendants and Appellants.

1 Crim. No. 17702
(Superior Court No. 65379)

Edward Rosas appeals from an order by which he was admitted to probation after he pleaded guilty to a charge of receiving stolen property (Pen. Code, § 496). We affirm the order.

The appeal challenges the propriety of an order denying a motion by appellant to suppress certain evidence which was essential to the prosecution's case (Pen. Code, § 1538.5). The motion to suppress evidence was submitted on the preliminary hearing transcript.

An untested informant telephoned a police officer and told him that at a body shop, operated by appellant's co-defendant, would be found a stolen car which the informant identified by make, model, color and license number. The informant stated that the car had been stolen from a particular used car lot, and that it was being cut up at

the body shop, inferably for the purpose of cannibalizing body parts. By telephone the officer verified that a vehicle fitting the description given by the informant had been stolen from the used car lot. The officer then organized a party of several policemen who went to the body shop to investigate. They found the shop open for business and went in to check the identification of the cars that were in the shop. The stolen car was found almost immediately; it had been cut in several pieces. Appellant was one of the persons present at the shop when the officers entered. Arrests were made and criminal charges were filed. The police officers who entered the body and fender shop did not have a search warrant; they proceeded under the authority of Vehicle Code section 2805 which provides in pertintent part:

"A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."

Appellant contends that Vehicle Code section 2805 is unconstitutional. That contention was considered and rejected in People v. Grey (1972) 23 Cal.App.3d 456 at 461; it need not be reexamined here. The fact that automobile wrecking or reconstruction shops are part of a closely

regulated industry which requires administrative inspection to suppress theft and fraud distinguishes Marshall v. Barlow's Inc. (1978) ___ U.S. ___ (56 L.Ed.2d 305).

Appellant contends that Vehicle Code section 2805 must be applied as being subject to the requirement that an officer making entry must provide himself with an "inspection warrant" of the type specified in Code of Civil Procedure section 1822.50. This contention has no merit. The inspection warrant procedure was created in response to Camara v. Municipal Court (1967) 387 U.S. 523 and See v. City of Seattle (1967) 387 U.S. 541 in order to regulate official entries of private premises where inspections are to be made in connection with building, fire, safety, plumbing, electrical, health, or zoning regulations. That procedure has no relation to the present situation where entry was authorized by another statute for the purpose of an administrative inspection of a shop operating in a closely regulated industry.

It is argued that the entry was unlawful because it was effected by local police officers rather than by highway patrol officers as mentioned in Vehicle Code section 2805. The contention must be rejected as contrary to applicable authority (People v. Brown (1970) 4 Cal.App.3d 382, 387).

Appellant contends that even if a routine inspection under Vehicle Code section 2805 would be lawful, where an "actual criminal investigation" has been launched, a search warrant should be obtained. But the legislative purpose in enacting

Vehicle Code section 2805 was to protect the public from theft and fraud in the operations of the specified categories of automobile service shops. It would be unreasonable to allow routine inspections under section 2805 where the officer has no indication of any impropriety, but to preclude administrative inspection where there is some reason to suspect that activities are in progress of the kind at which Vehicle Code section 2805 is aimed.

Finally, appellant contends that the evidence obtained by the officers should have been suppressed because they did not knock, identify themselves, demand admittance, and explain their purposes before entering the shop (Pen. Code, §§ 844 and 1531). The Penal Code sections relied upon by appellant have no application to the present situation where the officers did not force their way into the shop, inasmuch as the shop was operating and open to the public (People v. James (1971) 17 Cal.App.3d 463).

The probation order is affirmed.

Christian, J.

We concur:

Caldecott, P. J.

Good, J.*

* Under assignment by the Chairperson of the Judicial Council.